No. 49. Sav. &c.

Con. into to make

Brf. of Woolworth for Appellees

In the Supreme Court of the United States.

OCTOBER TERM, 1897.

Filed May 18, 1898.

No. 49.

CONSTANTINE J. SMYTH, ATTORNEY GENERAL, ETC., ET AL.,
APPELLANTS,

v.

OLIVER AMES, ET AL.

No. 50.

CONSTANTINE J. SMYTH, ATTORNEY GENERAL, ETC., ET AL.,
APPELLANTS,

v.

GEORGE SMITH, ET AL.

No. 51.

CONSTANTINE J. SMYTH, ATTORNEY GENERAL, ETC., ET AL.,
APPELLANTS,

v.

HENRY L. HIGGINSON, ET AL.

J. M. WOOLWORTH,
Solicitor for Appellees and of Counsel.

GEO. W. BRIDE, PRINTER, CHARLESTON.

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The appellees submit that the petition of the appellants for a re-hearing of these causes and a modification of the decree therein, ought not to be allowed for the following reasons:

1. The application comes too late. These causes were heard at the May term of the Circuit Court in 1894, and the decrees were entered on the 23rd of No-

vember of that year. They were argued in this court on the 4th and 5th of March, 1896. Having been ordered to rehearing, they were again elaborately argued on the 5th and 6th of April, 1897, and the judgment and opinion of this court were pronounced on the 7th of March, last. It cannot be said that the point upon which further argument is desired, was overlooked, for it was assigned for error when the cases were first brought here. This will appear by reference to the second clause of the assignmente of errors. (See pp. 2115; 2132 and 2148 of the Record.) It can hardly be said that the decrees were not carefully settled by the counsel for the respective parties and by the court. Nor is this left to inference. The counsel for the appellants approved the form of the decrees; (see pp. 100, 220, 374) and, before doing so, he must, with his usual carefulness shown throughout the litigation, have given his best attention to every clause and every word. Inadvertence cannot possibly be attributed to the parties or the court in framing the decrees. If there was error in the matter now complained of, the appellants had it in mind, when they took their appeal; and their duty was to call the attention of this court to it on one or other of the arguments at this bar. If they did not think it of consequence when the whole matter was open, or if, for any reason, they did not care to insist upon it, they ought to abide by their judgment at that time.

2. Nor is there any need of opening a door which the appellants have deliberately closed upon them-

selves. The decrees provide a just and adequate process for ascertaining if the rates ought to be reduced. Instead of leaving the appellants free to make the reduction at their pleasure, the decree contemplates an inquiry, to be prosecuted in the orderly course of judicial proceedings, by allegations and proofs on one side and the other, and a determination of the right of the matter, together with an appeal by any party feeling himself aggrieved. This process is just as apt when the apppellants propose to reduce the rates twenty per cent, as when they reduce them twenty-nine and a half per cent. In one case just as must as in the other, they ought to be restrained from arbitrary action and compelled to submit to judicial inquiry and judgment.

Not only is this true in every case, but it is especially so when the whole matter has been carefully investigated.

3. The record shows that the companies ought not to reduce the rates at all.

The bills charge that the rates which obtained when they were filed, did not yield more than enough to cover operating expenses and fixed charges. The 4th paragraph of the bill against the Union Pacific, is as follows:

"For many years last past the earnings of the roads of the Union Pacific Company have not been sufficient to more than pay their operating expenses and fixed charges; and your orators and all other stockholders of said company have not in any way received from said company dividends or other returns upon their stock; except the main road from Omaha to

Ogden, none of the roads of said company in this state have for years past earned their operating expenses and fixed charges; nor has that road earned more than what will cover such expenses and charges; if it were detached from all other roads of the company its earnings would not be sufficient to yield to its stockholders more than two per cent after paying operating expenses and fixed charges." (p. 13 of the Record)

The fifth paragraph of the bill against the Northwestern contains this allegation:

"Since the construction of the said roads, in this state, the administration of the affairs of said companies, upon and with reference to their whole system, and particularly of the roads in this state, has been characterized by exceptional skill and judgment, and the returns from the business were all that the same could be made to render. No salaries have been allower or paid to any of its officers or employees which were excessive or unreasonable or unusual; nor in the purchase of property or any other dealing of the said companies, have unnecessary or excessive sums been paid; and on the other hand, the most rigid economy has been exercised in all such matters. At no time since the said roads of the said Fremont and Omaha Companies in this state were built, have the earnings therefrom yielded to your orators or the stockholders, of said companies a fair return upon their capital; in no one year has such return equalled 5 per cent upon the investment; and for two years last past, the said roads have not earned more than the necessary expenses of operating the same and interest on its funded debt. And your orators and the other stockholders of the said companies have not, during that time, received from it any dividends arising from the earnings of said companies in this state. And it is certain that hereafter the earnings of said companies will not be increased." (p. 122 of the Record).

The allegations of the bill against the Burlington are as follows:

"The business of the company in 1892 was exceptionally favorable as regards volume and earnings. The year 1891 showed much less favorable net results, largely on account of the drought which impoverished a large part of the state, while the present year does not promise good returns by reason of the severe depression of business prevalent throughout the country, and especially in this state; for all of which reasons the above figures for 1892 are fair and reasonable for an estimate for other years."

"The administration of the said company has always been characterized by exceptional skill and judgment, and the returns from the business were all that the same could be made to render."

"The said company's surplus earnings in 1892 did not yield a fair return to your orators and its other stockholders upon their capital." (p. 242 of the Record.)

The proofs go much farther than these allegations; they show that the rates charged by the companies on local business at the filing of the bill and at the signing of the decrees did not yield enough to meet operating expenses and fixed charges. The case of the Union Pacific will be first examined. That company was incorporated by Act of Congress passed in 1862, which act provided for a first mortgage upon the line from Omaha to Ogden. The bonds secured by that mortgage and outstanding when the proofs were taken, amounted to $27,229,000.00. On this subject Mr. Mink, on page 702 of the record, says: "The first mortgage of the Union Pacific Railroad Company covering the line between Omaha and a point five miles west of Ogden, in Utah, made, I think, in 1866, the bonds under which become due from 1896 to 1899, and under which, bonds to the amount of $27,229,000.00 are outstanding."

The next lien is mentioned by Mr. Mink on page

709 of the record; he says: "The United States has a lien on that part of the Union Pacific Company's railroad extending from Omaha to a point five miles west of Ogden, 1,034.49 miles, to secure an issue of bonds made by the United States amounting to $27,236,512.00 and the accumulation of interest thereon." Mr. Mink proceeds on the same page, to speak of the requirements under the Thurman Act passed by congress, and says that "In 1891 the requirements of that Act, which were met by the company, amounted to $1,278,488.82; for the year 1892 they amounted to $1,338,044.37; from 80 to 85 per cent of these annual obligations, appertains to the line from Omaha to Ogden." On page 703, Mr. Mink says: "The sinking fund 8 per cent mortgage of the Union Pacific Railroad Company made in 1873 under which bonds to the amount of $3,730,000.00 are outstanding." And he afterwards says that this is a secnnd mortgage on the railroad extending from Omaha to Ogden. He then mentions a collateral trust 6 per cent indenture, executed in 1890, under which there are still outstanding, $3,672,000.00 in 6 per cent bonds which become due July 1, 1908. Mr. Mink states several other liens, but the inquiry in respect of them will lead into so many intricate questions and calculations, that we shall not give them attention.

On page 1640 will be found a statement of the taxes paid in the State of Nebraska by the Union Pacific Railroad Company main line and the Omaha & Republican Valley, as follows:

	Union Div.	O. & R. V.
Year 1891	$242,964.92	$90,051.30
Year 1892	237,297.58	80,772.93
Year 1893	234,919.85	75,658.41

These three mortgages, the requirements of the

Thurman Act and the taxes are the charges upon the railroads of the Union Pacific Company. As most of them are upon lines running through Nebraska into other states, it is necessary to ascertain what are chargeable upon the property in that State. Again, as these annual charges are to be raised upon all of the business of the company, passenger and freight, it is necessary to ascertain what proportion of them is to be raised out of freight earnings, excluding passenger earnings. The inquiry being what part of them is to be borne by local freight, earnings on through freight must also in turn be eliminated. This process of exclusion brings us to an answer to the question what must local freight contribute to the fixed charges? In most cases, it has been found almost impracticable to ascertain what is a fair share of the investment to be assigned to local business, so as to charge it with its due proportion of the fixed charges. In this case the matter is not of very great difficulty, although it involves a somewhat extended calculation. The first mortgage being upon the road from Omaha to Ogden, the amount attributable to the lines in Nebraska, is ascertainable in this way: that line, being 1034.49 miles long, the amount chargeable to it per mile, is $26,333.65 which is reached by dividing the amount of the mortgage $27,229,000 by the number of miles 1034.49 (See Mr. Mink's statement to that effect stated above) On page 625 Mr. VanKuren says there are 467 miles in Nebraska. Multiplying the amount per mile by this sum, gives $12,297,814.55 as the proportion of the mortgage upon the line in Nebraska. This sum is to be raised out of both passenger and freight business. On page 620, Mr. VanKuran says that 70 per cent is chargeable to freight, and 30 to

passenger business. 70 per cent of $12,297,814.55 is $8,608,470.20. This is the sum which freight, both through and local, should contribute to this mortgage. It remains to ascertain how much of the freight business is properly chargeable to local freight. On page 648 Mr. VanKuran says that 15 per cent of the whole business of the company was business beginning and ending in this State. 15 per cent of the freight earnings, is $1,291,270.00. This is the charge upon the property applicable to local freight. 6 per cent interest on it is $77,476.20; which is what local freight must contribute to the interest on the first mortgage.

The second mortgage for $3,730,000 drawing 8 per cent interest, is to be treated in the same way. This mortgage being upon the whole line from Omaha to Ogden, the share attributable to the mileage in Nebraska, is to be ascertained by dividing the same by 1034.49 the whole number miles, which is $3,607.35; this being the amount of the mortgage upon one mile, multiplied by 467, the number of miles in Nebraska, gives $1,684,632.45 as the earnings both passenger and freight in that state; and 70 being for freight, $1,179,242.71 is chargeable to freight, both through and local; 15 per cent of this being local freight, we have $176,886.40 as the amount of the mortgage chargeable to that item; this mortgage drawing interest at 8 per cent $14,150.91 is the sum, which local freight must contribute to the interest upon the second mortgage.

We have a third mortgage for $3,622,000 drawing six per cent interest. This sum is to be divided first by the number of miles of the whole line, which gives the amount chargeable upon the road per mile; this sum, multiplied by the number of miles in Nebraska,

that is, 467, gives the amount chargeable upon the line in that state; seventy per cent of which is for freight, both through and local; 15 per cent being for local freight and the interest being 6 per cent, we have as the sum which local freight in Nebraska must contribute to the interest of this mortgage, $10,305.88.

Taxes are to be dealt with in the same way, excepting that we start with the amount paid in Nebraska, which as has been shown, was in 1892, $237,297.58. On this 70 per cent must be earned by freight, and 15 per cent by local freight which is $24,916.24.

In the opinion of the court, operating expenses for that year are stated to be $264,605.00. We have also seen that the requirements of the Thurman Act were $1,338,044.39. Mr. Mink says that from 80 to 85 per cent of these obligations appertained to the line from Omaha to Ogden. Taking 80 per cent as the proper proportion and dividing it by the number of miles of the whole line, multiplying the result by the number of miles in Nebraska, taking 70 per cent of that for freight, both through and local, and 15 per cent for local, we reach $50,762.49 as the sum which local freight should contribute to those charges. These several sums are to be added together, thus:

Local Freight should contribute to interest on the first mortgage	$ 77,476.20
It should contribute to the 2nd mortgage	14,150.91
It should contribute to the 3rd mortgage	10,305.88
It should contribute to taxes	24,916.24
It should contribute to U. S. requirements	50,762.49
Operating expenses for local freight	264,605.00
Total	$ 442,216.72

From this sum are to be deducted the total earn-

ings of local freight, which is $398,262.00, which leaves a deficiency of $43,954.72. This shows that the charges obtaining in 1892, were insufficient to meet the fixed charges and operating expenses and that the company ought not to reduce its rates below those which obtained at that time.

If it be said that there is nothing to show that the proceeds of these mortgages went into the property, or are properly chargeable thereon, we answer that the first mortgage was authorized by the Acts of Congress of 1862 and 1864; and that the U. S. Requirements were also imposed by an Act of Congress. Liens thus authorized by legislation, cannot be questioned by any party in any proceeding, and especially not by the State when attempting to prescribe statutory rates.

If we were to count only these two charges, and say nothing of the second and third mortgages, the fact remains that the earnings were insufficient to pay them and the cost of operation, as may be seen by a very slight review of the figures given above. And as the presumption is that the second and third mortgages were properly liens upon the property, nothing having been shown to the contrary, they ought equally to be taken into account in ascertaining what local freight must contribute to meet the fixed charges. The result is, that upon proper allegations in the bill against the Union Pacific and proofs adduced by the plaintiffs, the question of the reasonableness of the company's charges was involved in the controversy in the court below, with the result that those charges were not what the necessities of the company required and therefore ought not to be reduced.

If we pass from the Union Pacific to the Burling-

ton, the calculation is somewhat more simple. On page 589, Mr. Taylor states that the amount of interest charges in 1892 were $2,224,171.17; this is the charge on the road in Nebraska. On page 592 he says that 70 per cent of the total earnings arises from the freight business distinct from passenger business, and on page 590, that 21.27 per cent is business beginning and ending in the State. Pursuing the same method of calculation for the Burlington as for the Union Pacific, we take first 70 per cent of the earnings to ascertain what is applicable to freight, and 21.27 per cent for local business, and reach $331,156.84 as the sum which local freight must contribute to the interest charges of that year. On page 1640 Mr. Taylor states that the taxes upon the road in Nebraska for 1892, were $503,971.04; this reduced by the same process to local freight is $75,036.24; the operating expenses as shown in the table inserted in the opinion of the court, are $918,-881.00. These sums added together give $1,325,074,98 as the amount which local freight should earn to meet operating expenses and fixed charges. The earnings on local freight of that year as shown by the same table, were $1,237,884; this leaves a deficiency of $87,190.08. So that it appears by the allegations and proofs, that, in 1892, local freight at the rates charged by this company, did not yield to it its share of the fixed charges, for which reason they ought not to be reduced at all.

Passing now to the Elkhorn Company, we have Mr. Kirkham's testimony (p. 1621 of the record) of the taxes in the state of Nebraska, which in 1892 were $212,824.59. He also says that there is one 6 per cent mortgage for $18,400,000.00. Taxes, reduced by the process followed above, call upon local freight for $36,-450.41 and interest upon the mortgage reduced in the

same way calls for $189,336% which two items are to be contributed by local freight. The table in the opinion of the court referred to above, shows $271,761 as the expense of doing the local business; the earnings of the company on local freight were $336,714. These figures may be put together, thus:

Taxes	$ 36,450.41
Interest	189,336.00
Operating expenses	271,161.00
Total	$496,947.41
From which deduct earnings	336,714.00
Leaves a deficiency of	$160,233.41

of local freight to meet its share of fixed charges and operating expenses. These figures, therefore, show that the rates charged by this company in 1892, were not what they ought to have been to meet the operating expenses and fixed charges, and that the company ought not to reduce them.

The calculations given above are for the year 1892', which was, as several of the witnesses say, Mr. Dilworth among the number, the best that the companies ever saw; so that it is not worth while to go through the same computations for the other years. Indeed, Mr. Taylor says that the business of the companies for the year immediately preceding the hearing of this cause at the Circuit, (1893) was 25.5 per cent less than the preceding year. (See p. 1639 of the Record.) If, as suggested,conditions have, perhaps, greatly improved since that time, the wonder is why the appellants and their predecessors did not long ago take advantage of the provision of the decree which gave them leave to

show these facts, and obtain from the Circuit Court a modification of the injunction.

The computations given above do not cover several of the roads concerned in these litigations, as for instance the St. Paul, Omaha, St. Joseph and Kansas City Companies. The condition of those lines in respect of earnings, expenses and fixed charges are much less favorable to the contentions of the appellants than those of the companies above mentioned, and no sufficient reason calls for any examination in respect of them.

On the hearing of these causes at the Circuit, all of the matters above stated were carefully gone into and explained, for the purpose of showing that the rates charged by the companies in 1892, were insufficient to meet the proportion of the operating expenses and fixed charges properly assignable to local freight. On the first argument in this court, the same explanations were made for the same purpose. On the last argument in this court, the counsel for the appellees did not think it worth while to trouble the court with that particular matter, for the simple reason that the record conclusively showed that the statutory rates were insufficient to meet the operating expenses of local freight and its proportion of the fixed charges. Nevertheless, the reasonableness of the charges made by the companies was in the record and before the court, and would have been the subject of explanation, if the appellants had not found themselves obliged to abandon the contention that the going rates on local freight

were insufficient to answer the calls of fixed charges after meeting operating expenses

If there is any question about the last clause of the decree being broad enough to justify an application to the Circuit Court in respect of reductions of the rates from those charged by the companies to those fixed by the statute, that clause may be enlarged by this court; that is the only relief to which, in any view of the case, the appellants may be entitled.

On Friday, the 13th instant, counsel for the appellees was served with what is called a supplemental petition, without any information of an order of the court permitting the filing thereof; and it is believed that no such leave has been granted; certainly the time for answering such a petition has not been limited by this court. For this reason, it is submitted that that petition cannot be entertained.

The addition l reason stated in this supplemental petition for the r lief prayed, that the legislature can not pass another act, raises a serious question, fair consideration of which is not practicable in the time limited for this showing. That question can better be dealt with when the legislature renews its attack upon the railroads; a contingency, not probable after the instruction which has been afforded by the opinion and judgment of this court in these cases. It is not worth while to speculate upon what some future legislature may do.

The supplemental petition further seeks a modification of the decree "restraining the appellants from taking steps to reduce the rate on any one article fixed in the act, declared to be unconstitutional." The desire of the appellants seems to be, to be at liberty to reduce the rates on some one or more articles included in the classification of the act, although they may not reduce the charges upon all of them. This raises a question which cannot fairly be dealt with at this time and which is of a most serious character.

In all cases of the character of those before the court, the question has been whether the total earnings can be reduced by the legislature. It is not believed that this court will at this time, commit itself to the proposition that the question is whether the rates fixed by the legislature on a single article, or a number of articles each considered by itself, are compensatory. Nor are the appellees prepared to say that the true question is, not what the total earnings on all business is, but whether the statutory rate for the service rendered in hauling each single seperate article is sufficient and covers the cost of hauling it. If the court is of opinion that that question is fairly before it for consideration at this time, argument at the bar ought to be heard. If, however, the court is of opinion that it is prepared to lay down the rule involved in the suggestions of the so-called supplemental petition, the appellees will accept such opinion with equanimity.

J. M. WOOLWORTH,
Solicitor for Appelleees and of Council.